77

(2)

No. 07-495

FILED
DEC 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LAVONNA EDDY AND KATHY LANDER,
Petitioners,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

WILLIAM B. HILL, JR.
Counsel of Record
NANCY E. RAFUSE
SANDRA K. PARK
ASHE, RAFUSE & HILL, LLP
1355 Peachtree Street, N.E., Suite 500
Atlanta, Georgia 30309-3232
(404) 253-6000

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Fourth Circuit Court of Appeals correctly stated the legal framework for collateral estoppel when it affirmed the district court's judgment.

RULE 29 STATEMENT OF A CORPORATE RESPONDENT'S PARENT AND NON-WHOLLY-OWNED SUBSIDIARIES

Waffle House, Inc. hereby submits its corporate disclosure statement, and states that no parent or publicly-held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29 STATEMENT OF A CORPORATE RESPONDENT'S PARENT AND NON-WHOLLY-OWNED SUBSIDIARIES	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT—REASONS FOR DENYING THE PETITION	6
A. Petitioners Failed to Identify Any Conflict Created by the Majority's Decision	6
B. This Case is Unusual and the Issues Involved Are Not of General Importance.	7
1. The majority made a case-specific determination based on the extraordinary facts in this case	8
2. Petitioners' contention that their claims are inextricably linked to Mr. Lander's claim cuts against them here, and bars a duplicative trial	17
C. Petitioners Have Had a "Full and Fair Opportunity to Litigate the Issue"	19
D. Petitioners' New Arguments Should Not Be Considered	21
CONCLUSION	23
APPENDIX—Excerpts from D.S.C. trial transcript, Oct. 25-27, 2004	1a

TABLE OF AUTHORITIES

CASES	Page
Arizona v. California, 460 U.S. 605 (1983)	20
DeBraska v. City of Milwaukee, 189 F.3d 650 (7th Cir. 1999)	10
Gonzalez v. Banco Central Corp., 27 F.3d 751 (1st Cir. 1994)	11, 12
Martin v. American Bancorporation Retirement Plan, 407 F.3d 643 (4th Cir. 2005)	15
Montana v. United States, 440 U.S. 147 (1979)	19, 20
Perez v. Volvo Car Corp., 247 F.3d 303 (1st Cir. 2001)	11
Perry v. Globe Auto Recycling, Inc., 227 F.3d 950 (7th Cir. 2000)	9, 10
Sedlack v. Braswell Services Group, 134 F.3d 219 (4th Cir. 1998)	6
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)	21
Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974)	13
Tice v. American Airlines, Inc., 162 F.3d 966 (7th Cir. 1998)	10, 11
Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co., --- U.S. ----, 127 S. Ct. 1199 (2007) (unanimous decision)	21

STATUTES & RULES	
42 U.S.C. § 1981	1, 5
42 U.S.C. § 2000a	1, 5
South Carolina Stat. § 45-9-10	1
United States Supreme Court Rule 10	7

TABLE OF AUTHORITIES

OTHER AUTHORITIES — Page

Restatement (Second) of Judgments § 39 (1982) 20

IN THE

Supreme Court of the United States

No. 07-495

LAVONNA EDDY AND KATHY LANDER,
Petitioners,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On July 2, 2003, African-American Plaintiffs Mark Lander, Kathy Lander, Vernon Eddy and Lavonna Eddy filed a complaint in the District of South Carolina, alleging claims of discrimination pursuant to 42 U.S.C. § 1981, 42 U.S.C. § 2000a, and S.C. Stat. § 45-9-10.[1] Plaintiffs claimed they were discriminated against based on their race at a Waffle House restaurant in Walterboro, South Carolina.

The incident alleged by Plaintiffs occurred on July 6, 2000, when Plaintiffs visited the Walterboro Waffle

[1] Plaintiffs do not appeal the dismissal of their state law claims.

House on their way home from Georgia to North Carolina. (V. Eddy at 68, J.A. at 82A; 78, S.J.A. at 1552A; 80, J.A. at 83A; M. Lander at 80, S.J.A. at 1580A.) While the Eddys and Mark Lander went to the Waffle House, Kathy Lander remained behind and walked to a nearby ice cream shop. (K. Lander at 72-73, S.J.A. at 1563A-64A; 80, J.A. at 167A; L. Eddy at 131, S.J.A. at 1539A.) Mrs. Lander walked to the Waffle House after the other Plaintiffs were already inside the restaurant. (L. Eddy at 131, S.J.A. at 1539A; K. Lander at 80, J.A. at 167A.) She remained outside to eat her ice cream. (V. Eddy at 84, S.J.A. at 1554A; K. Lander at 80, J.A. at 167A; M. Lander at 89, J.A. at 188A.)

Mr. Lander, who entered the restaurant after the three Eddys, claims that, as he entered, he heard a female voice say, "We/they don't serve niggers in here."[2] (V. Eddy at 84, S.J.A. at 1554A; M. Lander at 89-90, J.A. at 188A-89A; L. Eddy at 134, S.J.A. at 1540A.) The alleged utterance of this racial comment was the sole basis of Plaintiffs' race discrimination claim. Mr. Lander conceded that, though he was the only Plaintiff who allegedly heard the offensive comment, he did not see who made the comment and could not say whether it was a Waffle House employee who made the comment. (M. Lander at 109-11, J.A. at 202A-04A.) Lavonna Eddy admitted (that if said at all) the author of the comment "could have been" one of the customers. (L. Eddy at 151-52, S.J.A. at 1544A-45A.) Mrs. Lander admitted that she never made it inside the restaurant, much less to a table. (K. Lander at 135, J.A. at 175A.) She did not seek or

---

[2] Deposition and trial testimony varied as to whether Mr. Lander heard the statement, "We" or "They" "don't serve . . . ."

request service, nor did she present the opportunity for any Waffle House employee to serve her. (*Id.*)

Mr. Lander communicated the alleged comment to the rest of the group at the table. (M. Lander at 92-93, J.A. at 191A-92A.) Just then, a Waffle House server arrived at the table and asked, "May I help you?"[3] (*Id.* at 93, J.A. at 192A.) The family, who had not heard the alleged racial remark, decided to leave the restaurant. (Pet. App. at 3a.)

On July 15, 2004, the trial court heard oral argument on Defendant's Motion for Summary Judgment, and issued its ruling on September 7, 2004. The trial court granted Defendant's Motion for Summary Judgment with respect to Lavonna Eddy, Vernon Eddy and Kathy Lander, and denied it with respect to Mark Lander. (*See* Order on Defendant's Motion for Summary Judgment at 15-16, J.A. at 751A-52A.) The district court determined that the "factual particularities of this case" had not precisely been addressed by relevant precedent. (*Id.* at 14, J.A. at 750A.) The district court further explained that only Mr. Lander had heard the alleged comment and that "[i]ndeed, Mrs. Lander found out what happened inside the restaurant only as the others passed her in the doorway on their way out. . . . [H]ad Mr. Lander not told those plaintiffs who first seated themselves inside the restaurant what he heard, their experience probably would have been limited to being greeted by a Waffle House waitress attempting to serve them." (*Id.* at 14-15, J.A. at 750A-51A.)

---

[3] Mr. Lander stated that he had "no reason" to think that the offer of service was in any way negative had he not heard the remark that "somebody" in the restaurant had allegedly made. (M. Lander at 149, J.A. at 211A.)

A jury trial on the merits of whether Mark Lander's family experienced race discrimination at the Walterboro Waffle House commenced on October 25, 2004. Mark Lander, Kathy Lander, Lavonna Eddy and Vernon Eddy testified at the trial (the Landers and Mr. Eddy testified in person; Ms. Eddy's testimony was introduced via videotape and deposition designations).

The Waffle House employees working during Plaintiffs' visit (servers Rebecca Manzo and Terry Hiers, and grill operator Matthew Johnson) testified at trial that they did not make the racial comment, nor did they hear anyone else make such a remark. (*See* Matthew Johnson—Trial Tr. at 492 (S.J.A. at 1501A), 494-95 (J.A. at 1190A-91A); Rebecca Manzo —Trial Tr. at 555-56, 558, 560, 564-65 (J.A. at 1202A-07A); Terry Hiers—Trial Tr. at 517-18, 520-22, 525-26 (J.A. at 1193A-99A).) Also on duty that day, but not present in the customer section of the restaurant during Plaintiffs' brief visit, was the restaurant manager, Cheryl Wilson. (Trial Tr. at 589-90, S.J.A. at 1518A-19A.) Ms. Wilson also testified at trial that she never heard Mr. Johnson, Ms. Hiers or Ms. Manzo use the "N-word." (*Id.* at 586, 588-89, S.J.A. at 1516A-18A.)

Instead, Waffle House's current (Ms. Hiers) and former (Mr. Johnson and Ms. Manzo) employees testified that they all greeted the Eddys and Mr. Lander when they entered the restaurant. (Trial Tr. at 493, 559, S.J.A. at 1502A, 1513A.) The Eddys and Mr. Lander did not respond. (*Id.* at 559, S.J.A. at 1513A.) Ms. Manzo went to Plaintiffs' table and offered to serve them. (*Id.* at 493-94 (Johnson), 527 (Hiers), 559-60 (Manzo), S.J.A. at 1502A-03A, 1511A, 1513A-14A.) The Eddys and Mr. Lander discussed

something among themselves, and then left the restaurant without explanation. (*Id.* at 527, S.J.A. at 1511A; 560, S.J.A. at 1514A.)

Plaintiffs were in the restaurant probably less than two minutes. (Trial Tr. at 40, J.A. at 1136A; V. Eddy at 91, J.A. at 86A.) None of the Plaintiffs ever identified Ms. Manzo, Ms. Hiers or Mr. Johnson as having uttered the alleged remark.

The jury was able to assess the credibility of the witnesses, weigh the evidence, and they returned a verdict for Waffle House on October 27, 2004 in one hour. (*See* Signed Verdict Form, J.A. at 1487A-88A; *see also* Oct. 27, 2004 docket entry, J.A. at 19A (jury deliberations began at 2:30 p.m. and ended at 3:30 p.m.).) The trial court entered judgment in accordance with the jury's verdict on October 28, 2004. (*See* Judgment and Amended Judgment, J.A. at 1489A-90A.)

Mark Lander, Kathy Lander, Lavonna Eddy and Vernon Eddy appealed to the Fourth Circuit Court of Appeals on a number of issues, including: (1) whether the trial court erred in granting summary judgment with respect to the claims of Vernon Eddy, Lavonna Eddy and Kathy Lander under 42 U.S.C. § 1981 and 42 U.S.C. § 2000a; (2) whether the trial court abused its discretion by denying Plaintiff Mark Lander's request for a mistrial as a result of certain statements made in defense counsel's opening statement and closing argument; and (3) whether the trial court abused its discretion by granting Waffle House's motion *in limine* concerning hearsay evidence of other alleged complaints of discrimination unrelated to Plaintiffs' visit to the Walterboro Waffle House. (*See* Brief of Appellants, "Statement of Issues Presented.")

The Fourth Circuit Court of Appeals affirmed the district court's denial of Plaintiff Mark Lander's request for a mistrial, affirmed the evidentiary rulings, and affirmed entry of judgment against all Plaintiffs. (Pet. App. at 3a-15a.) Plaintiffs then filed a Petition for Rehearing *En Banc*, which was denied. (*Id.* at 44a-45a.) Plaintiff Mark Lander does not appeal the Fourth Circuit's decision. The conduct and result of the October 2004 trial are not in dispute. In their Petition for a Writ of Certiorari ("Petition"), Plaintiffs Kathy Lander and Lavonna Eddy appeal only the Fourth Circuit Court of Appeals' affirmance of the district court's entry of judgment against them. (Petition at 1.)

ARGUMENT—REASONS FOR DENYING THE PETITION

Petitioners Kathy Lander and Lavonna Eddy fail to identify any compelling reasons for granting their Petition as set forth in Rule 10 of this Court's rules.

A. Petitioners Failed to Identify Any Conflict Created by the Majority's Decision.

Petitioners do not challenge the analytical framework for collateral estoppel applied by the majority, which cited *Sedlack v. Braswell Servs. Group*, 134 F.3d 219, 224 (4th Cir. 1998). (Pet. App. at 8a-9a.) The majority correctly stated the Fourth Circuit's five-factor test for applying collateral estoppel: "(1) the issue sought to be precluded is identical to one previously litigated; (2) the issue must have been actually determined in the prior proceeding; (3) determination of the issue was a critical and necessary part of the decision in the prior proceeding; (4) the prior judgment must be final and valid; and

(5) the party against whom preclusion is asserted must have had a full and fair opportunity to litigate the issue in the previous forum." (*Id.* at 9a.) Petitioners do not contend—and have never contended—that *Sedlack* is no longer good law. Nor can they, as Petitioners themselves relied upon *Sedlack* in their Reply Brief in support of their Appeal From the United States District Court for the District of South Carolina as the correct framework for analyzing collateral estoppel in the Fourth Circuit. (*See* Reply Brief of Appellants at 3.) As such, the Petition rests on Petitioners' contention that the Fourth Circuit Court of Appeals factually misapplied this properly stated rule of law. On this basis alone, the Petition should be denied, as "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." United States Supreme Court Rule 10.

B. This Case is Unusual and the Issues Involved Are Not of General Importance.

To attempt to state a matter of general importance to this Court, Petitioners focus on the dissenting opinion, rather than the majority's ruling. Petitioners seek to shift the focus of this Court away from the majority's actual holding based on the extraordinary facts and procedural history specific to the case at bar. Specifically, the majority held that "there is no need to allow a separate trial on the claims of Mrs. Lander and the Eddys, because all issues relevant to their claims have been heard and rejected by a jury." (Pet. App. at 8a.) Petitioners wrongly claim that the majority dubbed Mark Lander the "virtual representative" of Petitioners Kathy Lander and Lavonna Eddy, thus extinguishing Mrs. Lander's and

Ms. Eddy's rights as individual plaintiffs. To reach the decision, the majority made a fact-specific determination based on Fourth Circuit precedent, which involved "almost exactly the same fact situation" as the case at bar. (*Id.*) As such, Petitioners' citations to cases concerning "virtual representation," which contemplate true non-parties attempting to litigate similar issues in two or more separately-filed lawsuits, are not on point. Therefore, the issue of the Court of Appeals' stance on "virtual representation" is not properly before this Court through the instant case.

1. *The majority made a case-specific determination based on the extraordinary facts in this case.*

As part of its fact-specific determination that renders this case different from the "virtual representation" cases Petitioners press upon the Court, the majority found that, **"[c]ertainly, whether or not the racist statement was actually made was central to the resolution of Mr. Lander's claim and is the very issue that would be litigated by Mrs. Lander and the Eddys."** (Pet. App. at 9a (emphasis added).) The majority also determined that: "[t]he 'rights sought to be vindicated' by the Eddys and Mrs. Lander are the same as those of Mr. Lander. Both cases arose out of the same incident. All plaintiffs were represented by the same attorney." (*Id.* at 11a); **"[a]s the jury deemed Mr. Lander's evidence, including his own testimony, to be insufficient for him to prevail, it necessarily follows that the same evidence would be insufficient for Mrs. Lander and the Eddys to prevail."** *(id.)*; **"whatever facts may have been in dispute were resolved in the subsequent jury**

trial which absolved the defendant" (*id.*); and **"[b]ecause we find no error in the trial of Mr. Lander, we conclude that the claims of Mrs. Lander and the Eddys also fail."** (*Id.* at 15a.)[4]

The differences between the facts concerned in the "virtual representation" cases cited by Petitioners and the instant case highlight the unusual circumstances in the instant case that justified the Fourth Circuit's affirmance of entry of judgment against Petitioners, and merit denial of the Petition. Each of the cases cited by Petitioners involve plaintiffs who sought to file and proceed with claims in two entirely separate lawsuits from the start. Different from those facts is the instant case in which all plaintiffs collectively filed the action, less than all were dismissed at summary judgment, yet a trial on the ultimate issues on all the same evidence as to all claims—including testimony of Mrs. Lander and Ms. Eddy—proceeded on the surviving plaintiff's claim.

Therefore, Petitioners' claimed conflict between this case and others is an illusion resulting from the construct of their argument. For example, Petitioners rely on *Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950, 952-53 (7th Cir. 2000), in which the plaintiff sued defendants for wrongful towing of his car and

---

[4] Petitioners incorrectly claim that the Fourth Circuit "solely" based its decision on three factors: (1) that the Landers and Ms. Eddy raised the same rights to be vindicated; (2) the claims arose out of same incident; and (3) they were all represented by the same attorney. Though these factors were considered by the Fourth Circuit, Petitioners' summary omits the important fact-specific reasons provided by the Fourth Circuit (detailed in bold) that cement the fact that the unusual factual and procedural setting of this case merited affirmance of judgment as to Mrs. Lander and Ms. Eddy.

alleged violations of RICO. Unable to prevail in his own case, the plaintiff purchased an assignment of another individual's claims based on the towing of the other individual's vehicle. The Seventh Circuit held that the assigned claims could not be barred based on *res judicata* because such a holding would "cast doubt on many legitimate assignments that occur every day in the world of civil litigation." *Id.* at 952. In *DeBraska v. City of Milwaukee*, 189 F.3d 650, 653 (7th Cir. 1999), an FLSA lawsuit, the defendant attempted to preclude 773 plaintiffs from proceeding with their claims based on a settlement agreement entered by the defendant, other plaintiffs, and a union almost eight years prior to the lawsuit. The Seventh Circuit rejected the argument, stating that the promise made by the Union and the prior plaintiffs could not bind the new plaintiffs in their own lawsuit, pointing out that "FLSA suits are opt-in, rather than representative actions." The Court pointed out that the second lawsuit referred to "subsequent instances" of the "same type" of behavior alleged in the first lawsuit and to allow the prior settlement "to bar these claims would be akin to barring suit by a man who has been punched for the second Tuesday in a row by the same ruffian because the suit for the first blow has been abandoned. . . ." *Id.* at 654 (emphases in original). *Tice v. American Airlines, Inc.*, 162 F.3d 966, 968 (7th Cir. 1998), concerned whether a different lawsuit, brought by different airline pilots, alleging a separate set of claims, but based on the same American Airlines policy challenged in prior lawsuits, could proceed. Among reasons for finding the claims of the plaintiffs in the second lawsuit would not be precluded, the Seventh Circuit found that the "Tice plaintiffs, however, did not participate in those earlier cases,

and the claims they present are somewhat different: because they were already American pilots, they are not complaining about a failure to be hired." *Id.* at 969. "Furthermore, their interests at the time diverged from those of the *Johnson* [the prior lawsuit] plaintiffs . . . , which suggests that the *Johnson* plaintiffs could not have adequately represented them." *Id.* "[T]here are too many differences between the Tice plaintiffs and the plaintiffs in the earlier cases to make preclusion appropriate." *Id.* at 973. Other cases cited by Petitioners are similarly distinguishable. *See, e.g., Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 754 (1st Cir. 1994) (concerning two separate groups of plaintiffs who sued sellers of property for land sale fraud scheme in lawsuits filed five years apart); *Perez v. Volvo Car Corp.*, 247 F.3d 303, 311-12 (1st Cir. 2001) (involving two lawsuits with two different classes of plaintiffs defined by the model of Volvo vehicles that they had purchased—"[t]he two groups are entirely separate and distinct").

Petitioners are unable to dispute the fact of their extensive involvement as parties in the case at bar. In their Petition, Petitioners are careful to limit their argument to the contention that they were not "parties" to the trial,[5] (*vice* parties to the lawsuit). This distinction makes inapposite each of the "virtual representation" cases cited by Petitioners and eliminates any question of general importance that warrants this Court's review.

Substantively, Petitioners can present no basis for permitting a duplicate trial concerning the Lander-Eddy family's two-minute visit to the Walterboro

[5] Even this contention is misleading inasmuch as Petitioners participated in the trial.

Waffle House. Confronted with the reality that each Petitioner has been extensively and substantively involved in this case since its commencement in July 2003 up through and including the trial of this case, Petitioners cannot articulate any evidence presented to the jury during the October 2004 trial which would have been different.

In addition to their status as actual parties, Petitioners' involvement in this lawsuit included: (1) representation by Plaintiffs' counsel of record since the beginning of this lawsuit; (2) deposition testimony given by each as a named Plaintiff; (3) exchange of written discovery and responses with Waffle House, Inc.; (4) testimony at and participation in the trial; (5) by and through their attorneys, submission of numerous pleadings to the trial court, the Fourth Circuit Court of Appeals, and this Court; and (6) by and through their attorneys, communications with Waffle House, Inc. regarding this lawsuit.[6] Because of their extensive involvement in this case, Petitioners are being insincere when they contend that they are "strangers" to the proceedings (Petition at 9) or that the verdict in this case was rendered in their "absence." (*Id.* at 25.) As stated,

---

[6] Even if this Court were to consider Petitioners' "virtual representation" arguments, the Court should nonetheless rule that the Petition should be denied because Petitioners did exercise substantial control in this lawsuit as defined by case law cited by Petitioners. *See Gonzalez*, 27 F.3d at 760 (explaining that the amount of participation in "the early stages of the Rodriguez [first lawsuit] litigation is particularly probative on the issue of substantial control, for it was during this period that many pivotal strategic decisions were made"). There is no question that Mrs. Lander and Ms. Eddy substantially participated in this lawsuit through all stages of the case.

Petitioners testified at trial. Petitioners' efforts to downplay their role in this case in the October 2004 trial by referring to themselves as "non-parties," and Mark Lander as the "other party" (*see, e.g.*, Petition at 4) should be given no weight.

Due to the unusual factual and procedural background of the instant case, the only case directly on point is *Street v. Surdyka*, cited by the Fourth Circuit majority. As the majority accurately states, the facts in *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974), are "almost exactly the same" as the facts in the instant case. (Pet. App. at 8a.) In *Street*, the trial court granted partial summary judgment dismissing the plaintiff's claims against two of the three defendants in the case. *Street*, 492 F.2d at 370. The case, like the case at bar, was "extraordinary" in that the facts material to the dismissed defendants' liability "were fully developed in the subsequent trial" against the remaining defendant. *Id.* at 374-75. Specifically, the plaintiff's (Street) own testimony:

> described the entire sequence of his encounters with the cadets [the dismissed defendants], and both cadets testified to the chain of events that led to Street's arrest. The uncontroverted facts in the record establish that Street was not entitled to recover damages from the cadets. The jury verdict absolved Officer Surdyka [the remaining defendant] from liability on the same set of facts.

Id. Petitioners offer no opinion, other than *Street*, in which a partial entry of summary judgment dismissed some, but not all, claims in the lawsuit, but a trial nonetheless proceeded directly bearing on the claims with respect to dismissed parties, and the jury decided the ultimate issue to be tried as to all parties.

Petitioners argue that "[i]n the court's view, because Mark Lander had had a jury trial that had resolved disputed issues of fact, the other plaintiffs were not entitled to one." (Petition at 6.) This summary of the Fourth Circuit Court of Appeals' "view" is superficial. It is not the fact that Mark Lander had a trial that merited collateral estoppel of Petitioners' duplicative trial on their identical claims, but the fact that Kathy Lander and Lavonna Eddy (and Vernon Eddy) fully participated and testified in this case and the trial that merits estoppel. As the Fourth Circuit Court of Appeals explained, "The evidence in the record at the time of summary judgment 'as embellished and explained' by subsequent trial testimony, convinces us that a remand for trial on the Eddys' and Mrs. Lander's claim 'would be to no avail.'" (Pet. App. at 10a.) Critically, Petitioners do not, and cannot, take issue with this ultimate ruling.

At trial, each of the Petitioners recounted his/her version of the facts that serve as a basis for her race discrimination claim. Petitioner Kathy Lander went so far as to discuss her own feelings about the alleged incident. (*See* Trial Tr. at 297, Resp. App. at 5a (Kathy Lander testimony—Q: [discussing letter Mrs. Lander wrote to Waffle House] And were you writing this letter just . . . for yourself? A: No, not just for myself, for my family. It was a humiliating event. My aunt and uncle were in that restaurant. If you could have seen their faces as they were walking out—"); at 300, Resp. App. at 5a (Kathy Lander testimony—A: "My belief, at least for me, is that it was humiliating. We discussed what had happened when it occurred, we know what occurred, we made the complaint. Continuing to bring it up is just—makes it more

humiliating. It's frustrating now sitting here and talking about it.").)

The instant case presents an even stronger case for applying collateral estoppel than even the *Street* case. In *Street*, the jury did not formally decide whether or not the earlier dismissed cadets were liable to the plaintiff. Nonetheless, the Fourth Circuit correctly decided that, because the Officer was absolved of liability on the "same set of facts," so would the cadets had they remained in the litigation. In the case at bar, the jury did determine the ultimate issue for all of the Petitioners' claims, finding that Waffle House did not discriminate against the Petitioners during their July 2000 visit to the Walterboro Waffle House.[7] As such, Petitioners' claim that "the jury was not instructed on their claims" is rendered meaningless, as the jury decided that the Eddy-Lander

[7] Because the ultimate question at issue for Petitioners was decided by the jury, Petitioners' reliance on the Fourth Circuit's opinion concerning "virtual representation" in *Martin v. Am. Bancorporation Retirement Plan*, 407 F.3d 643, 652 (4th Cir. 2005), is misplaced. First, as detailed herein, the majority in the case at bar did not, as Petitioners argue, determine that Mr. Lander was their "virtual representative." Second, in *Martin*, the Fourth Circuit cited *Sedlack* for the exact test relied upon by the majority in the case at bar when determining whether the petitioners in that case were estopped from pursuing their claims. *See Martin*, 407 F.3d at 653 (adopting five-factor *Sedlack* test). The Court determined that the petitioners in *Martin* were not estopped from pursuing their claims, but only because the disputed issue—whether the petitioners were entitled to certain pension benefits—was never actually determined in the lower court action. This is an important distinction from the facts in the instant case in which it cannot be disputed that the ultimate issue—whether Waffle House discriminated against Petitioners—was heard and decided by a jury.

party had not been refused service at the Waffle House on the basis of their race. (Petition at 4.)

Specifically, the Verdict Form asked the jury, "Did the plaintiff prove, by the preponderance of the evidence, each of the elements of his § 1981 claim against the defendant?" (J.A. at 1487A.) The jury answered "no." (*Id.*) The trial court's instruction concerning the elements of Section 1981 made clear to the jury that the elements of a Section 1981 claim included denial of service or "markedly hostile" treatment based on the customer's race. The trial court's charge included the following statements: (1) ". . . refusing to contract or serve someone on the basis of their race amounts to a violation of Section 1981"; and (2) ". . . being admitted into a restaurant and ultimately being served does not necessarily mean that no violation of Section 1981 has occurred. You must decide not only whether Waffle House refused plaintiff's service outright, but also whether Waffle House interfered with Mr. Lander's right to the enjoyment of all benefits, privileges, terms and conditions of his contractual relationship by treating him in a markedly hostile manner because of his race." (Trial Tr. at 818-19, Resp. App. at 9a-10a.) The jury's verdict, which followed testimony by Mark Lander, Kathy Lander, Lavonna Eddy, Vernon Eddy, and each of the Waffle House employees on duty during the alleged visit, made clear their factual finding that the Landers and Eddys had not experienced a denial of service or markedly hostile treatment at the Walterboro Waffle House on the basis of their race.

2. *Petitioners' contention that their claims are inextricably linked to Mr. Lander's claim cuts against them here, and bars a duplicative trial.*

Petitioners attempt to create an artificial separation of Mark Lander's claim and Kathy Lander's and Lavonna Eddy's claims. In their efforts, Petitioners find themselves in the untenable position of arguing that the family operated as a "cohesive unit" at all times during the July 2000 Waffle House visit (and thus they should have been permitted to survive summary judgment), but that their claims are distinct and separate from Mark Lander's. (*See* Brief of Appellants at 17 ("The family entered the restaurant as a cohesive group intending to be served together.").)

As Plaintiffs-Petitioners' testimony demonstrates, the claims of Kathy Lander and Lavonna Eddy rise and fall with Mark Lander's claim. There has never been any question that Mark Lander, the only person of the Eddy-Lander party who claimed to have heard the alleged offensive comment, is the linchpin of Plaintiffs' claims. (*See* Reply Brief of Appellants at 11 ("Thus, after Mr. Lander was denied service and the Waffle House employee conveyed the message through Mr. Lander that African Americans would not receive service, Mrs. Lander had no other choice but to join her family in seeking service elsewhere." (emphasis added)); Brief of Appellants at 16-17 ("The racist remark made to Mark Lander that 'We don't serve niggers here' without doubt constituted a denial of service to him in violation of Section 1981. Section 1981 likewise provides similar protection to his family members who did not hear the remark but learned of it when Mr. Lander communicated it to

them immediately upon hearing it.").) As early as the July 15, 2004 oral argument on Waffle House's motion for summary judgment, the trial court asked Plaintiffs' counsel, "[Mrs. Lander] never went in the restaurant, how could she have a cause of action for refusal to serve of someone who never goes in?" Plaintiffs' counsel responded, "Only to the extent you consider her membership in that same party to kind of be there by the coattails with the other people. That's all." (S.J. Tr. at 29-30, J.A. at 726A-27A.) Given that Mr. Lander's claim failed on its merits—which Mr. Lander does not appeal—Petitioners are not entitled to retry his failed claim, and as such, their claims must fail.

Moreover, as a matter of policy, the reasons provided by the Fourth Circuit and Petitioners for finding that summary judgment was improperly granted as to Mrs. Lander and Ms. Eddy—that " [b]y denying service to one member of the party, the defendant effectively denied service to the other members of the same party" (Petition at 7a)—cuts against them here. Essentially, Mrs. Lander and Ms. Eddy argue that, even though they did not hear the offensive comment, they were discriminated against only because Mark Lander was a member of their party to the restaurant and as such, they should not have been expected to dine there after he heard the alleged comment. To be fair, the reverse must also be true. Given that a jury determined that Mark Lander (the only person who claimed to have heard the offensive comment) was not discriminated against at the Waffle House, it must be true that his family was not either. No other result can follow the jury's decision in the October 2004 trial.

C. Petitioners Have Had a "Full and Fair Opportunity to Litigate the Issue."

Petitioners do not dispute that the only prerequisite for applying collateral estoppel in question here is the fifth prong, whether Kathy Lander and Lavonna Eddy "had a full and fair opportunity to litigate the issue." (Petition at 6.)

To hold that Petitioners did not have a full and fair opportunity to litigate their claims in the case they collectively filed in the District of South Carolina would unreasonably elevate form over substance. Simply put, Petitioners Kathy Lander and Lavonna Eddy were named Plaintiffs in the lower court action. They participated in all aspects of discovery, and as such, all documents to be used at trial had been produced and all witnesses who would be called upon at trial had been identified. Trial commenced on October 25, 2004 and ended on October 27, 2004, during which Petitioners testified.[8]

Though Petitioners cite generally to a party's right to "his own day in court," given the extraordinary facts of this case, the countervailing considerations of efficiency and finality expressed by this Court in *Montana v. United States*, 440 U.S. 147, 153 (1979), should be given greater weight. In *Montana*, this Court held:

> [t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the

---

[8] In addition, Mrs. Lander attended a group field trip with the attorneys and Mr. Lander to the Walterboro Waffle House in preparation of their testimony for trial. (*See* Trial Tr. at 204, 207, 307, Resp. App. at 2a-3a, 6a-7a.) Clearly, Mrs. Lander was intimately involved in trial (indeed pre-trial) strategy.

> expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Id. at 153-54 (footnote omitted). *See also Arizona v. California*, 460 U.S. 605, 619 (1983) ("[W]hile the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision . . . a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive."). This Court further explained, " [O]ne who . . . assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record." *Montana*, 440 U.S. at 154. *See also* Restatement (Second) of Judgments § 39 (1982) ("A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.").[9] Petitioners cannot seriously contend that they were absent nonparties who did not have their day in court.

Moreover, Petitioners do not contend that the October 2004 jury trial was unfair or inadequately conducted, nor do they contend that Plaintiffs' counsel was ineffective at trial.

---

[9] Comments on this Restatement section include that a person who assumes control of litigation on behalf of another "has the opportunity to present proofs and argument on the issues litigated. Given this opportunity, he has had his day in court and should be concluded by the result. . . . It is not necessary, however, that the controlling party have a proprietary or financial interest in the outcome of the litigation."

D. Petitioners' New Arguments Should Not Be Considered.

Petitioners raise several new arguments in their Petition, which were not raised in the courts below. Those arguments are waived and should not be considered by this Court. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."); *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 127 S. Ct. 1199, 1207 (2007) (unanimous decision) ("we ordinarily do not consider claims that were neither raised nor addressed below"). Petitioners offer new arguments in their attempt to distinguish *Street* and raise for the first time arguments concerning an alleged violation of Petitioners' rights under the Seventh Amendment.

Petitioners' new efforts to distinguish *Street* should not be considered. Petitioners are not unfamiliar with the Fourth Circuit's holding in *Street* as Petitioners in their brief to the Fourth Circuit Requesting a rehearing *en banc* summarized the *Street* opinion as follows: "this Court opined that the district court may have erred in granting summary judgment to the cadets but that the summary judgment decision would stand because Street's own testimony at trial established that he had no viable claim against the cadets to take to trial." (Petition for Rehearing *En Banc* at 5.) In that same submission, Petitioners also admitted that the *Street* opinion "did not discuss whether the *Street* plaintiff could be deemed a 'virtual representative.'" (*Id.*) The Fourth Circuit rejected Petitioners' arguments for rehearing *en banc*. Now, Petitioners seek to distinguish *Street* by arguing that the facts in *Street* concerned only

"uncontroverted" facts whereas the facts in the instant case are controverted.

Even if this Court were to entertain Petitioners' new arguments, those arguments lack merit. Petitioners know this, however, because in a footnote, Petitioners state that "[i]t is possible that the court in *Street* relied not only on the uncontroverted facts that had been in the record at the time of summary judgment, but also additional uncontroverted facts that came into the record at trial." (Petition at 22 (emphasis added).) It is not only a possibility, but a fact that the Fourth Circuit in *Street* did consider the plaintiff's own testimony at trial to embellish and explain the summary judgment record because of the extraordinary set of facts that led to a trial on plaintiff's claims despite the partial dismissal of some of the claims and parties. This reasoning is exactly as applied by the Fourth Circuit in this case. Unable to escape this conclusion, Petitioners submit that "if" the Fourth Circuit relied on evidence of record at the time of summary judgment "as embellished and explained" by the plaintiff's subsequent trial testimony, "the court [in *Street*] likely committed error." For obvious reasons, Petitioners' contention that the Fourth Circuit committed error in *Street* is improper and has no effect on either the validity of the holding in that case or the outcome of this case.

In any event, a dissection of the factual determination of the Fourth Circuit and whether it properly applied the holding of *Street*, which admittedly did not even concern the "virtual representation" issue pressed upon the Court as a basis for granting their Petition, is not proper grounds for consideration by this Court.

Petitioners' arguments concerning their Seventh Amendment rights are entirely new and should not be considered.

CONCLUSION

The Petition should be denied. Petitioners ask the Court to grant their Petition based on a discussion of a legal doctrine not relied upon by the majority when reaching its decision. The factual and procedural setting in this case is so unusual that the majority made a case-specific decision to collaterally estop the Petitioners from retrying their claims based on an undisputed correct statement of the legal framework of collateral estoppel.

The July 2000 incident alleged by the Eddy-Lander family rests on a single racist remark allegedly heard by only Mark Lander. Petitioners have stated that the Eddy-Lander family's visit to the Walterboro Waffle House lasted no more than two minutes. After a trial on the merits, the jury found that Mark Lander's family was not denied service or treated in a markedly hostile manner on the basis of their race. Petitioners do not dispute the fairness of the jury's verdict, the procedures or rulings during the trial, or the adequacy of their representation by counsel during the course of the trial or this case as a whole. Petitioners Kathy Lander and Lavonna Eddy nonetheless wish to burden the courts and Waffle House by retrying the exact same claim despite the unmistakable conclusion reached by the jury that the Eddy-Lander family was not denied service or mistreated based on their race at the Walterboro Waffle House during their brief July 2000 visit. Mrs. Lander and Ms. Eddy have figuratively and literally had their "day in court." The Fourth Circuit Court of

Appeals correctly determined that given Mrs. Lander's and Ms. Eddy's substantial participation in the lower court action, coordinated efforts among all plaintiffs and their counsel, and the fact that their claims cannot possibly survive given the jury's verdict in the Mark Lander trial, Mrs. Lander and Ms. Eddy must be barred from a duplicative trial.

Respectfully submitted,

WILLIAM B. HILL, JR.
Counsel of Record
NANCY E. RAFUSE
SANDRA K. PARK
ASHE, RAFUSE & HILL, LLP
1355 Peachtree Street, N.E., Suite 500
Atlanta, Georgia 30309-3232
(404) 253-6000

Counsel for Respondent

December 7, 2007

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

2:03 - CV - 2183

MARK LANDER

vs.

WAFFLE HOUSE, INCORPORATED

Trial in the above-captioned matter held on Monday, October 25, 2004, commencing at 9:00 a.m., before the Hon. David C. Norton, in the United States Courthouse, 85 Broad St., Charleston, South Carolina, 29401.

APPEARED FOR PLAINTIFFS:

DRINKER, BIDDLE & REATH
1500 K. Street, N.W.
Washington, DC 20005
By: Greald S. Hartman, Esquire
Mary E. Kohart, Esquire

FERGUSON, STEIN, CHAMBERS
741 Kenilworth Ave., Suite 300
Charlotte, NC 28204
By: Henderson Hill, Esquire

APPEARED FOR DEFENDANT:

ASHE, RAFUSE & HILL
1355 Peachtree St., N.E., Suite 500
Atlanta, GA 30309
By: Nancy E. Rafuse, Esquire
William Hill, Esquire

* * * *

[204] individual waitress for her remark, or any particular incident?

MR. W. HILL: Objection, it's foundation, calls for an opinion not qualified to give.

THE COURT: I'll sustain that objection.

MR. H. HILL: The Court's indulgence just one moment.

THE COURT: Sure, no problem, Mr. Hill.

MR. H. HILL: Thank you, Your Honor, those are my questions.

THE COURT: Mr. Hill?

MR. W. HILL: I'll try and be very brief, Your Honor.

RECROSS-EXAMINATION

BY MR. W. HILL:

Q. In response to a series of questions from Mr. Hill, you stated that you took a field trip yesterday?
A. Yes, we did.
Q. Who is we?
A. A party, lawyers, my wife.
Q. Okay.
A. Mr. Eddy.
Q. You went, correct?
A. Yes.

* * * *

[207] A. She wasn't there.
Q. She wasn't there?
A. No.
Q. Do you recognize her?

A. Yes.
Q. Who is she?
A. That's Sue Huhta.
Q. So she did not go?
A. No, she didn't go.
Q. So who was the other lawyer, the third lawyer who went?
A. It was Erin.
Q. Who?
A. Erin.
Q. Erin who?
A. I don't know Erin's last name, but I know as Erin.
Q. Erin.
A. Um-hum.
Q. Who drove you to the Walterboro Waffle House?
A. I rode with Erin.
Q. How many cars did you all take?
A. I believe it was two.
Q. Two cars. So not only did you meet with your lawyers yesterday to prepare for your testimony, you

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

2:03 - CV - 2183

MARK LANDER

vs.

WAFFLE HOUSE, INCORPORATED

Trial in the above-captioned matter held on Tuesday, October 26, 2004, commencing at 9:00 a.m., before the Hon. David C. Norton, in the United States Courthouse, 85 Broad St., Charleston, South Carolina, 29401.

APPEARED FOR PLAINTIFFS:

DRINKER, BIDDLE & REATH
1500 K. Street, N.W.
Washington, DC 20005
By: Greald S. Hartman, Esquire
Mary E. Kohart, Esquire

FERGUSON, STEIN, CHAMBERS
741 Kenilworth Ave., Suite 300
Charlotte, NC 28204
By: Henderson Hill, Esquire

APPEARED FOR DEFENDANT:

ASHE, RAFUSE & HILL
1355 Peachtree St., N.E., Suite 500
Atlanta, GA 30309
By: Nancy E. Rafuse, Esquire
William Hill, Esquire

* * * *

[297] the Waffle House to have a written record of what occurred. I wanted to have a written record of what occurred.

Q. And were you writing this letter just to yourself?

A. Just to myself?

Q. Just for yourself?

A. No, not just for myself, for my family. It was a humiliating event. My aunt and uncle were in that restaurant. If you could have seen their faces as they were walking out—

MS. RAFUSE: Responsiveness. I move to strike.

THE COURT: Overruled.

BY MR. HARTMAN:

Q. Continue.

A. Thank you. I wrote it for my family. What my aunt and uncle may have experienced in the 40s, 50s and 60s, that should not be happening again. So I wanted to write it, I wanted to get it in writing. I wrote it for my family because it is not right. It was not right.

Q. And did you write any other letters about the same time that you wrote the Waffle House?

A. I did.

Q. And who else did you write to?

* * * *

[300] that he's an angry customer, but when someone doesn't approach us right away, he'll make an effort to contact or get the waitress or the waiter's attention, because he's not as—the word isn't trusting, but he's just not as tolerant anymore.

Q. And do you or your husband talk about the incident often at home?

A. No.

Q. Do you have any belief as to why that occurs?

A. My belief, at least for me, is that it was humiliating. We discussed what had happened when it occurred, we know what occurred, we made the complaint. Continuing to bring it up is just—makes it more humiliating. It's frustrating now sitting here and talking about it.

Q. Have you ever observed in the subsequent four plus years, your husband's behavior when you see a Waffle House sign as you're driving down a highway?

A. Other than to keep driving. Or the other day we saw one, he said there's another one. We kept driving.

Q. Can you take a moment to compose yourself, ma'am? Okay.

A. I'm okay.

Q. Okay? Would you personally ever go to a Waffle

* * * *

[307] Q. It's not all glass, is it?

A. Not completely.

Q. Right past where the door entryway is, there's a solid wall, correct?

A. Yes.

Q. It's a good three or four feet wide.

A. Okay, yes.

Q. That's what you remember, right?

A. I remember the glass, I know that there's the—that metal piece you're talking about, because we went on a field trip yesterday.

Q. So even when you were there yesterday—You went back yesterday?

A. Or Sunday, I'm sorry, I apologize.

Q. So when you went Sunday, if you're standing where the door is, there's glass?

A. There's glass, yes.

Q. Then there's the solid top-to-bottom wall?

A. That is correct.

Q. Then there's glass further down?

A. That is correct.

Q. So if you're standing at the door, you can't see to the right side of the restaurant because of that wall, correct?

A. If someone is standing at the door, perhaps you

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

2:03 - CV - 2183

MARK LANDER

vs.

WAFFLE HOUSE, INCORPORATED

Trial in the above-captioned matter held on Wednesday, October 27, 2004, commencing at 8:15 a.m., before the Hon. David C. Norton, in the United States Courthouse, 85 Broad St., Charleston, South Carolina, 29401.

APPEARED FOR PLAINTIFFS:

DRINKER, BIDDLE & REATH
1500 K. Street, N.W.
Washington, DC 20005
By: Greald S. Hartman, Esquire
Mary E. Kohart, Esquire

FERGUSON, STEIN, CHAMBERS
741 Kenilworth Ave., Suite 300
Charlotte, NC 28204
By: Henderson Hill, Esquire

APPEARED FOR DEFENDANT:

ASHE, RAFUSE & HILL
1355 Peachtree St., N.E., Suite 500
Atlanta, GA 30309
By: Nancy E. Rafuse, Esquire
William Hill, Esquire

* * * *

[818] Now, part (a) of element three above makes it clear that refusing to contract or serve someone on the basis of their race amounts to a violation of Section 1981. That is not the only way a defendant can violate Section 1981.

Section 1981 recognizes that it can be reasonably be said that a customer who enters a restaurant for service is contracting for more than just food.

Part (b) of 1981 encompasses, quote, "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship," end quote.

Dining in a restaurant includes being served in an atmosphere which a reasonable person would expect in a chosen place. In other words, the law recognizes that the contract performed between a restaurant and a customer does include more than just the food ordered. As such, being admitted into a restaurant and ultimately being served does not necessarily mean that no violation of Section 1981 has occurred. You must decide not only whether Waffle House refused plaintiff's service outright, but also whether Waffle House interfered with Mr. Lander's right to the enjoyment of all benefits, [819] privileges, terms and conditions of his contractual relationship by treating him in a markedly hostile manner because of his race.

Also regarding the third element of plaintiff's claim that he was the victim of intentional discrimination, Mr. Lander may prove that Waffle House unintentionally discriminated against him through the use of what the law refers to as either direct or circumstantial evidence.

I'll now instruct you on how plaintiff may establish defendant's discriminatory intent through the use of direct evidence. Direct evidence of discriminatory intent is evidence that directly shows the actual intent of the Waffle House employee at the time the conduct occurred. Direct evidence essentially means statements of intent to discriminate against a particular racial group, and can include the use of racial epithets or racial stereotypes.

Now, Waffle House is liable for the acts of its agent, servant or employee while the agent, servant or employee is acting within the scope of employment. However, an agent or employee who acts outside their delegated authority or outside the scope of employment may not bind Waffle House.

* * * *